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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR",

Petitioner,

vs.

McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18", VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,

Respondents.

PETITION FOR REHEARING FROM ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

VICTOR S. CICHANOWICZ
Counsel for Petitioner
Office & P.O. Address
26 Broadway
New York, N.Y. 10004
WHitehall 4-6877

VICTOR S. CICHANOWICZ
and
WILLIAM P. LARSEN
On Petition

Petitioner, Marina Mercante Nicaraguense, S.A., prays that this Court grant rehearing of its order of January 9, 1967, denying the Petition for a Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed herein on November 2, 1966.

Reasons for Granting Rehearing and Issuing the Writ

1. In denying certiorari in this case, this Honorable Court may not have been made aware that the overriding issues in this case involve (a) the safety of harbor craft in their operation on inland waters and (b) the authority of the Court of Appeals to disregard the Trial Court's finding of fact on the ground that it doubted that the unsafe condition of the tug RUSSELL 18, as so determined by the Trial Court had a causal effect on its sinking.

These questions continue to be of great importance to the safety and welfare not only of those working aboard such harbor craft but the marine industry and the nation as a whole. Tugboats such as the RUSSELL 18 will continue to operate, safe in the knowledge that as long as they are powered by Diesel engines and not steam propelled, they are not subject to inspection by the United States Coast Guard and can be operated by personnel neither licensed nor certificated, as was the case in the instant action.

Congress has indicated its concern for this anomaly which exists in the law. On January 10, 1967, a bill was introduced in the House of Representatives (H.R.

156) to do away with this artificial distinction and subject all towboats to United States Coast Guard safety controls particularly since the overwhelming majority of towing vessels now in use on inland waterways are Diesel powered.

While this proposed legislation may have no direct bearing on this case, it emphasizes the fact that in the absence of United States Coast Guard safety controls, a finding by the trier of the facts that the tug RUSSELL 18 was unstable and readily susceptible to an unusual list is not to be lightly disregarded because the Court of Appeals doubtingly assumed that the instability of the RUSSELL 18 had no causal effect on the tragedy.

The tug RUSSELL 18 had never been inspected for stability by its owner, McAllister, prior to the casualty notwithstanding the fact that its Diesel engine was installed off center and, as a result, the tug had an inherent list to port, the correction of which McAllister delegated to the crew of the tug. As long as such a state of affairs is permitted to exist, safety of tugboats such as the RUSSELL 18 will be a matter of individual choice.

2. Since the filing of the petition herein, the Court of Appeals for the Fifth Circuit has unanimously held in *Chaney* v. *City of Galveston,* 368 F.2d 774 (1966) that the findings of a District Court, sitting without a jury, are not lightly to be set aside because the Court of Appeals is not a trier of facts and cannot substitute its own judgment for that of the Trial Court. In this case, the Court of Appeals exceeded its function in both respects. It first held that it was unnecessary to pass on all the faults which the Trial Court found were committed, in order to resolve the issue of liabil-

ity, and then held that certain faults of the tug RUSSELL 18 whether characterized as negligence or unseaworthiness would not constitute a sine qua non cause of the sinking.

The litigants are thus confronted with opposing views as to the proper interpretation of Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. Unless this conflict is resolved, the reviewability of findings of fact will depend on the jurisdiction where review is sought and not Rule 52(a) F.R.C.P.

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Dated: New York, New York
January 25, 1967

Respectfully submitted,

VICTOR S. CICHANOWICZ
Counsel for Petitioner,
Marina Mercante Nicaraguense, S.A.
Office & P.O. Address
26 Broadway
New York, N.Y. 10004
WHitehall 4-6877

VICTOR S. CICHANOWICZ
and
WILLIAM P. LARSEN
On Petition

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

VICTOR S. CICHANOWICZ
Counsel for Petitioner